UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL UNION NO. 150 A/W INTERNATIONAL UNION
OF OPERATING ENGINEERS, AFL-CIO,

Respondent,

and Case 25-CC-228342

LIPPERT COMPONENTS, INC.,

Charging Party.

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

Statutes

TABLE OF AUTHORITIES (CON.)

Other Authorities Page(s)

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The International Union of Operating Engineers (IUOE) files this brief *amicus curiae* in response to the Notice and Invitation to File Briefs (Notice) issued by the National Labor Relations Board (NLRB or Board) on October 27, 2020. Addressing the Notice's first three questions, *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010) and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011) were well-reasoned and correctly decided; the Board has no basis in the record in this case to change the standards adopted in them for when picketing and non-picketing conduct violates Section 8(b)(4)(i) and (ii)(B). On the fourth question, if the Board were to adopt the position advanced by the General Counsel, particularly on the record in this case, the Board decision would unconstitutionally infringe on speech, in violation of the First Amendment.

INTEREST OF *AMICUS CURIAE*

The IUOE is a labor organization that has nearly 400,000 members in approximately 110 Local Unions located throughout the United States and Canada, including the more than 25,000

members of IUOE Local 150, the Respondent in the instant matter. IUOE Local Unions have regularly used inflatable animals (rats, cats, and gorillas) and banners to call public attention to their labor disputes with employers, and the IUOE has a strong interest in preserving their right to engage in such constitutionally protected speech. The IUOE similarly has a strong interest in an interpretation of the NLRA that does not limit unions' ability to lawfully appeal to employers engaged in business relationships with employers engaged in such labor disputes. This brief is filed in furtherance of those interests.

RECORD FACTS

In support of his extraordinary request to overturn extant Board law and make unlawful conduct numerous courts to have considered the question have found protected by the First Amendment, the General Counsel relies on a record that is, to put it charitably, scant. The transcript of the hearing is 41 pages long. Only one witness, a former lawyer for the Charging Party, testified, and Counsel for the General Counsel introduced only two exhibits in addition to the formal papers. The General Counsel produced none of the evidence the Board requires to demonstrate a Section 8(b)(4) violation. The record contains no evidence of confrontation, inducement, encouragement, picket signs, picketing, patrolling, blocking of ingress or egress, verbal threats, physical intimidation, coercion or business disruption. And, there is a complete absence of evidence from any employees at the site—in fact, there is no evidence in the record that any employees of the Charging Party were actually present working while the alleged unlawful conduct took place,[1] and no testimony from any customers who visited the site.

[1] To the extent a portion of the General Counsel's argument relies on a contention that Respondent Local 150's conduct could theoretically be characterized as "signal" picketing "induc[ing] or encourage[ing]" employees to cease performing services for the Charging Party,

Rather, the record, such as it is, demonstrates that Respondent Local 150 had a labor dispute with MacAllister Machinery, an equipment rental company. The Charging Party, Lippert Components, Inc., is a recreational vehicle component manufacturer that rents equipment from MacAllister. Thor Industries manufactures recreational vehicles and is one of Lippert's largest customers. Both Lippert and Thor participated in a recreational vehicle trade show in Elkhart, Indiana in late September 2018.[2] The trade show was located on the grounds of the RV Hall of Fame Museum. The Museum owns a large open grassy area, and the show took place in that open grassy area. (Tr. 20).

From September 24th through September 27th, two unidentified agents of Local 150 posted an inflatable rat on public property near the public entrance to the outdoor trade show. The agents also placed two stationary banners on either side of the inflatable rat. One banner stated "OSHA Found Safety Violations Against MacAllister Machinery, Inc.," and the other read "SHAME ON LIPPERT COMPONENTS, INC., FOR HARBORING RAT CONTRACTORS." The General Counsel did not allege that either banner was untruthful or defamatory.

The two individuals sat on lawn chairs next to the rat and banners; no evidence was presented that they confronted, marched, patrolled, carried or displayed picket signs, or moved from their seats on the chairs other than to tend to the banners as necessary. The rat and banners were put up between 9:30 and 10 am on the four mornings and the two individuals took the rat

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there is a complete absence of any evidence in this record that the prerequisite for any such contention—that any employees were actually present at the site to receive and act on the alleged "signal"—has been established, and certainly no evidence that anyone ceased doing anything as in response to the presence of the rat and the banners.

[2] All dates are 2018 unless otherwise indicated. References to the Administrative Law Judge's July 15, 2019 Decision will be made as "ALJ-D" followed by the page number; references to the May 14, 2019 transcript of the hearing will be made as "Tr." followed by the page number.

and banners down at 5 pm each evening and left the public property. There is no evidence that the individuals talked to anyone, and thus there is no evidence and no allegation that they confronted or verbally threatened or coerced anyone. The record is also devoid of any evidence concerning the reaction to the rat and the banners by the trade show attendees—for example, there is no evidence that anyone stopped, turned around, and left because they observed the rat, read the banners, or saw the Local 150 agents recumbent on their lawn chairs—and there is no evidence that the Local 150 agents engaged the trade show attendees at all—thus, no evidence of conversations or gestures or confrontations between them.

All the General Counsel offered was the testimony of a former Lippert lawyer, Dean Leazenby. As found by the Administrative Law Judge, on the morning of September 24th, Lippert's Chief of Human Resources, Nick Fletcher, called Mr. Leazenby into his office due to a "situation at the RV Hall of Fame." (Tr. 20–21). Fletcher indicated that "these signs and the rat were somewhat embarrassing to Thor and embarrassing to Lippert Components." (Tr. 20–21). Mr. Leazenby drove down to the trade show to take pictures of the demonstration; subsequently, he checked on the display each of the days in question. Mr. Leazenby testified that he saw the Respondent's use of the inflatable rat as a way to draw attention to the messages on the banners and in his opinion the inflatable rat was "quite menacing in its appearance" and was "intended to be scary." (Tr. 32). He attempted to contact counsel for Local 150 to discuss the display but did not succeed.

Other than his phone calls to counsel during the trade show, Mr. Leazenby and Lippert did not try to contact Local 150 regarding Lippert's employees or their working conditions, and there is no evidence that any representative of Local 150 contacted or tried to contact any employee or representative of Lippert on any matter. There is no evidence that Lippert's

presence at the trade show was in any way affected by the actions of Local 150's representatives—no evidence that the alleged "embarrassment" led Lippert or Thor to take any action other than to have Mr. Leazenby engage in the surveillance about which he testified. Finally, there is also no evidence that the presence of the rat and banners caused Lippert or Thor to contact MacAllister or cease doing business with MacAllister.

On this record, sparse as it is, the General Counsel seeks to make speech unlawful—symbolic speech with the rat and literal speech with the sentences placed on the banners—by contending that such speech is per se confrontational, coercive, and an inducement to cease work. And, he acknowledges that, in order to adopt his theory, the Board will have to overturn two decisions— *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010) and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011)—that reject his per se contentions and show a proper respect for the constitutional protections such speech is afforded. We proceed to address initially, pursuant to the first three questions asked by the Board in its request for briefing, the merits of *Eliason & Knuth* and *Brandon Regional Medical Center*, to the point that the Board should continue to rely on them and that there is nothing in the record of this case to justify the Board's acceptance of the General Counsel's unsupported invitation to overturn the doctrine stated in them. We then conclude with a brief discussion of the constitutional aspects of the speech at issue, to the point that holding such speech unlawful would inevitably invite conflict with the First Amendment.

Before turning to the argument, however, we offer a final thought about the record here. Given the weight of the lift the General Counsel is asking the Board to make—overturning well-reasoned extant law and finding violative conduct of a type that numerous courts have explicitly found protected by the First Amendment—the least the Board can ask of the General Counsel is

that he present a record identifying actual harms requiring the Board to rethink its current doctrine so that palpable, demonstrated problems are redressed. The General Counsel has miserably failed that task here. All that he presented is the truncated testimony of an advocate—the former lawyer for the Charging Party, at best a non-statutory employee—to the effect that he found the inflatable rat menacing and intended to be scary, a subjective description that would also characterize a number of Grimms' fairy tales for children.[3] His testimony utterly failed to describe any actual confrontation with anyone, or any inducement or encouragement, or any threatening, coercive, or restraining conduct; the record is thus completely devoid of any evidence that a purported victim of the alleged unfair labor practices suffered any harm or disruption to its business implicating the concerns for which Congress enacted Section 8(b)(4). The General Counsel could not have made a more innocuous record had he affirmatively tried to do so.

On this record, rather than wrestle with the weighty questions on which the Board has sought briefing, the most straightforward way for the Board to resolve this case would be to hold that the General Counsel has simply failed to make out a prima facie case of an 8(b)(4) violation without regard to the standard to be applied or considerations of constitutional avoidance.

ARGUMENT

In answer to the Board's initial question—1. Should the Board adhere to, modify, or overrule *Eliason & Knuth* and *Brandon Regional Medical Center*?—the IUOE responds that the

[3] Even children are not frightened by the rat; indeed, "When my toddler saw Scabby the Rat for the first time, she laughed." Oswalt, Michael, "Does Scabby the Rat cause fear – or is the NLRB inflating the balloon's power?" https://www.mcall.com/opinion/mc-opi-scabby-rat-balloon-nlrb-union-20190820-hlr4nf3tmja7hdumqn25ecuz2q-story.html.

Board should continue to apply the holdings of those two cases.[4] Both decisions contain well-reasoned, judicially accepted interpretations of the statutory language and avoid a potential conflict with First Amendment rights; the General Counsel's contrary view stretches the statutory language beyond the breaking point—claiming, for example, that conduct manifesting not a single one of the aspects of picketing is somehow "tantamount" to picketing—seemingly in a deliberate effort to provoke the constitutional confrontation. Abiding by the extant precedent is particularly appropriate on the facts of this case, where there is no evidence of actual confrontation, actual inducement or encouragement, or actual threats or coercion, and no evidence that the business of any neutral was actually disrupted in any way.

A. This case presents no reason to revisit *Eliason & Knuth's* determination that the peaceful display of stationary banners on public property does not threaten, restrain or coerce a secondary employer in violation of Section 8(b)(4)(ii)(B), nor, under the circumstances present here, is there a reason to revisit *Brandon Regional Medical Center's* related conclusion that the peaceful display of a stationary inflatable rat on public property similarly does not threaten, restrain or coerce a secondary employer.

The initial case on which the Notice seeks input is *Eliason & Knuth*. There, the Board stated:

> This case presents an issue of first impression for the Board: does a union violate Section 8(b)(4)(ii)(B) of the National Labor Relations Act when, at a secondary employer's business, its agents display a large stationary banner announcing a "labor dispute" and seeking to elicit "shame on" the employer or persuade customers not to patronize the employer. Here, the Union peaceably displayed banners bearing a message directed to the public. The banners were held stationary on a public sidewalk or right-of-way, no one patrolled or carried picket signs, and no one interfered with persons seeking to enter or exit from any workplace or business. On those undisputed facts, we find that the Union's conduct did not violate the Act.

Id., at 797.

[4] As the IUOE believes the Board should not change the extant law, this brief will not further address the Notice's second and third questions.

In reaching its conclusion that the union's peaceful display of the stationary banner on public property was not an unfair labor practice, the Board first examined the language of Section 8(b)(4)(ii)(B) and noted the statute required two elements for a violation to be found: "First, a labor organization must 'threaten, coerce, or restrain' a person engaged in commerce. Second, the labor organization must do so with 'an object' of 'forcing or requiring any person to . . . cease doing business with any other person.' *NLRB v. Retail Store Employees*, 447 U.S. 607, 611 (1980) (*Safeco*). Both elements must be proven to establish a violation." *Id.*, at 800, n. 12. Because the Board found that "the peaceful display of a stationary banner does not threaten, coerce, or restrain a secondary employer within the meaning of Sec. 8(b)(4)(ii)," in *Eliason and Knuth* the Board did not address whether the union's banner displays had an unlawful object. *Id.* Recognizing that, under its precedent, characterizing conduct as "picketing" had significant consequences, the Board held that the union's peaceful display of the banner did not constitute picketing, as the confrontational aspect associated with picketing was absent, and the display at issue sought to persuade rather than intimidate. *Id.*, at 802-803.

The second case the notice addresses is *Brandon Regional Medical Center*. There the Board again answered the intimidation vs. persuasion question on the persuasion side of the line, holding that a union's display of a large inflatable rat accompanied by handbills describing the relevant primary labor dispute was not picketing as there was no confrontational, coercive aspect to the display.[5] The Board further concluded that, considered as non-picketing activity, the rat display and the handbilling did not violate the proscriptions of the statute:

[5] "…we conclude that neither the rat display nor Holly's leaflet display constituted picketing. These displays, like the banner displays in *Eliason*, entailed no element of confrontation, as they were stationary and located at sufficient distances from the vehicle and building entrances to the hospital that visitors were not confronted by an actual or symbolic barrier as they arrived

> We similarly find no evidence here to support a finding that the display of the inflatable rat or Holly's leaflet display constituted nonpicketing conduct that was unlawfully coercive. Only six union agents were involved in the rat display, while Holly acted alone, and there is no evidence that their conduct was other than orderly. Like those who held the banners in *Eliason*, neither Holly nor the rat balloon attendants moved, shouted, impeded access, or otherwise interfered with the hospital's operations. The rat balloon itself was symbolic speech. It certainly drew attention to the Union's grievance and cast aspersions on WTS, but we perceive nothing in the location, size or features of the balloon that were likely to frighten those entering the hospital, disturb patients or their families, or otherwise interfere with the business of the hospital in a manner analogous to the conduct in the cases cited above or otherwise proscribed by Section 8(b)(4)(ii)(B).

Id. (footnote omitted).

The question the Notice presents then is whether there is anything about Local 150's stationary, peaceful display of an inflatable rat and two truthful banners on public property at the open-air RV show in Elkhart, Indiana for four days that requires the Board to revisit its *Eliason and Knuth* and *Brandon Regional Medical Center* determinations that similar inflatable rat and banner displays did not constitute a threat, coercion or restraint of a secondary employer. The short answer to this question is "no."

The General Counsel's criticism of the two decisions, as expressed in the brief filed in response to the Notice, is that the Board ignored its prior precedent on what constitutes "picketing" and improperly narrowed that word's definition to require a patrol and signs; he urges that the Board find "picketing" present where union agents are "posted" "at a given place of business accompanied by an element of confrontation for the purpose of advancing the union's cause." The General Counsel argues that the combined display of banners and an

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at, or departed from, the hospital. Further, there was no evidence that Holly or the individuals attending the rat physically or verbally accosted hospital patrons; nor does the evidence indicate that they were 'posted' near the hospital 'in a manner that could have been perceived as threatening' to hospital patrons." *Brandon Regional Medical Center*, at 1292 (citation and footnote omitted).

inflatable rat is "tantamount" to picketing, and inherently confrontational and thus coercive, in violation of Section 8(b)(4)(ii)(B).

The erudite brief filed by law professors Robert Gorman and Matthew Finkin, as well as the persuasive joint brief filed by North America's Building Trades Unions (NABTU) and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), both forcefully point out the extent to which the General Counsel's argument depends on giving the operative words—"threaten, coerce, restrain" and "picketing"—interpretations contrary to their "ordinary meaning," and this brief will not repeat those arguments here. Suffice it to say, while the Board is entitled to deference in its interpretation of the statutory language where the language is ambiguous, that deference does not entitle the Board to turn words into caricatures of themselves, and the General Counsel is not Humpty Dumpty[6]—he cannot make words take on a meaning they do not otherwise have based solely on his say so.

The General Counsel's brief to the Board struggles mightily to carry off this linguistic transformation, stitching together out-of-context snippets from prior decisions to make counterintuitive leap after counterintuitive leap—passive displays that do not contain any of the historically understood aspects of "picketing" are not "picketing" but unlawful nonetheless as "tantamount" to "picketing," and, absent any evidence of actual threats, coercion, or restraint, such passive displays designed to persuade can nonetheless be found unlawful because they are "inherently" confrontational and thus coercive. The General Counsel's theory of what constitutes confrontational coercion cannot be correct, as applying the standard he proposes would sweep within its ambit the conduct found lawful in *DeBartolo* and *NLRB v. Fruit & Vegetable Packers*

[6] "'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, `it means just what *I* choose it to mean—neither more nor less.'" Through the Looking Glass, in The Complete Works of Lewis Carroll 196 (1939), quoted in *TVA v. Hill*, 437 U.S. 153, 173 at note 18 (1978).

Local 760, 377 U.S. 58(1964) (*Tree Fruits*). Equally importantly, the General Counsel's leaps take his theory too far away from the language of the statute to be sustainable. As the late Justice Scalia reminded the Board in another case where the Board based its theory of a violation on a series of intuitive leaps that led to a result that strayed too far from the Act's actual words:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'

NLRB v. International Bhd. of Elec. Workers, Local 340, 481 U.S. 573, 578 (1987) (Scalia, J., concurring) (quoting *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 127 (1973)). The Board in *Eliason and Knuth* and *Brandon Regional Medical Center* properly drew the line short of finding unions' passive, stationary display on public property of banners and inflatable rats violative of Section 8(b)(4). The Board should not reconsider those decisions to move its interpretation of the statute to one untethered to the statutory language.

We close here by noting—again to simply point out that this case is a particularly inappropriate vehicle to reconsider extant law—that, if anything, Local 150's display of the inflatable rat and banners here provides even less of a basis for finding confrontation and coercion than the unions' use of the banners in *Eliason and Knuth* and the rat in *Brandon Regional Medical Center*. As the Administrative Law Judge correctly noted, the banners here are smaller (and thus arguably less confrontational or coercive) than the banners found lawful in *Eliason and Knuth* and its progeny,[7] and the rat here is also smaller (12 feet tall)—less of a "rat

[7] "The banners here, approximately 3.75 feet high by 8 feet long, are significantly smaller than the banners in the other three cases where the Board found the banners not to be symbolic barriers or confrontational. *Eliason & Knuth*, supra at 789 (banners were 3–4 feet high and 15–20 feet long); *New Star*, supra at 624 (banners were 4 feet high and 20 feet long); *Westgate Las*

colossi"—than the rat in *Brandon* (16 feet tall and 12 feet wide); the rat in *Brandon* gained additional height (and arguable prominence) by sitting on a truck bed, while the rat here was not elevated, but sat on a curb.

In addition, these smaller banners and smaller rat were displayed at an outdoor RV trade show on the grassy area on either side of the RV Hall of Fame. This context is significant for two reasons. First, while the record contains no further description of the "products" on display, a visit to the Thor website, https://www.thorindustries.com/ (last visited December 24, 2020), demonstrates that many of the recreational vehicles would dwarf the rat and banners—in an assembly of such behemoths the union's display necessarily took on less significance. Second, in *Eliason and Knuth* and *Brandon* the record demonstrated that the banners and the rat were displayed on public property in the vicinity of business establishments where employees of neutral businesses could arguably engage with them and possibly be persuaded. Here, as pointed out above, there is no evidence that any relevant Lippert workers were present at the trade show or that anyone attending the trade show engaged with the union display in any way other than driving by and observing it. Under these circumstances, there is even less of an arguable "confrontational, coercive" aspect to the union's passive, stationary, side-of-the-road display. Moreover, the language of the banners in this case was more specific and informative—and thus even more clearly on the persuasion side of the persuasion/intimidation divide—than the more general language on the banners in *Eliason and Knuth*.

And, finally, in this case the record contains absolutely no evidence of any additional conduct or statements by Local 150 that might muddy or arguably color the speech aspects of the

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Vegas, 363 NLRB No. 168, slip op. at 2 (2016) (banners were 4 feet high 30 and 20 feet long)." ALJ-D, at 6.

display of the rat and banners—for example, no statements (like the one made in *Brandon*) by Local 150 representatives that they were engaged in picketing when they weren't.

The holdings of *Eliason & Knuth* and *Brandon Regional Medical Center* are true to the statutory language of Section 8(b)(4). These decisions have an additional virtue; as we show in the next section, the interpretation of the statute the General Counsel urges would put the Board on a collision course with the federal courts' understanding of the First Amendment, a result the constitutional avoidance doctrine teaches the Board should avoid if the Act's language leaves it another plausible interpretation. See *Eliason and Knuth*, at 797, n. 1, citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 575, 577 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979).

B. The Board cannot find a violation here without running afoul of the First Amendment.

Critical characterizations of corporate special interests as pigs feeding at a trough are fairly ubiquitous in our political discourse. For an example deploying an inflatable pig, see https://wcfcourier.com/news/local/govt-and-politics/democrats-deploy-inflatable-pig-against-ernst/article_1556d086-c342-5fbd-a51c-4a490c349316.html (last visited December 24, 2020). Similarly, in the vernacular of the labor movement, "rats" are non-union workers, and, in the building trades, "rat contractors" are non-union contractors. To publicize a dispute with a non-union contractor, unions have erected inflatable rats for at least 30 years. Tzvi Mackson-Landsberg, *Is a Giant Inflatable Rat an Unlawful Secondary Picket under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?*, 28 CARDOZO L. REV. 1519, 1524 (2006). Unions' use of inflatables—symbolic speech to engage the public, ridicule or shame the opposition, and draw the media's attention—places union symbolic speech within the mainstream of the use of such

devices in public discourse. See, for example https://en.wikipedia.org/wiki/Donald_Trump_baby_balloon (last visited December 24, 2020).

As numerous courts have found unions' display of an inflatable rat on public property to be constitutionally protected, there is no mystery to the answer to Question 4 in the Board's Notice as to whether the Board's finding of a violation here would conflict with the First Amendment—it would and there is no way around that straightforward conclusion. Prominently, almost twenty years ago in a seminal case involving this same Respondent, Judge Ruben Castillo stated: "We easily conclude that a large inflatable rat is protected symbolic speech." *IUOE Local 150 v. Village of Orland Park*, 139 F. Supp. 2d 950 (N.D. Il. 2001); accord *Constr. and Gen. Laborers' Union No. 330 v. Town of Grand Chute*, 915 F. 3d 1120, 1123 (7th Cir. 2019) (*Grand Chute II*) (no doubt that union's use of the inflatable rat to protest employer practices is a form of expression protected by the First Amendment); *Tucker v. City of Fairfield*, 398 F.3d 456, 462 (6th Cir. 2005) (no question that the use of a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment, especially given the symbol's close nexus to union's message). And, as Member McFerran demonstrated in footnote 5 to her dissent from the Notice, to the extent that courts have qualified the First Amendment protection afforded to the display of an inflatable rat, the qualification has uniformly come because of additional conduct (picketing, threats, or mob assemblage) accompanying that display. No such additional conduct is present here.

The combination of the inflatable rat with two adjacent banners with short truthful messages in no way changes the First Amendment calculus—each is independently protected speech and combining them offers no basis for changing that result. If anything, adding speech which names the primary employer (MacAllister) and describes the Charging Party's relevant

conduct (harboring rat contractors) makes the combined display more obviously protected by the First Amendment, and makes clear that the General Counsel's effort to render the display unlawful seeks to penalize non-threatening, non-coercive, non-restraining speech, not conduct. We know from the elementary school playground that "two wrongs don't make a right"—the Board should reach the straightforward conclusion here that "two rights don't make a wrong."

Moreover, in considering the law in this area, the Board should keep in mind its proper role: when interpreting the scope of the First Amendment, the Board is not entitled to any deference,[8] and such determinations fall squarely within the federal courts' bailiwick. Thus, rather than follow the misguided lead of the General Counsel and ignore the ample body of federal precedent addressing the First Amendment protection for a union's display of banners and inflatable rats, the Board should give that precedent the binding effect it is due.

The General Counsel attempts to denigrate the union's speech here as "commercial" speech warranting less protection and subject to greater regulation. (GC 11/27/20 brief to the Board, at 18-19). However, as the Supreme Court has pointed out in *DeBartolo*, that argument is largely beside the point. "Of course, commercial speech itself is protected by the First Amendment…and however these handbills are to be classified, the Court of Appeals was plainly correct in holding that the Board's construction would require deciding serious constitutional issues…" *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 576 (1988). Similarly here, any construction of Section 8(b)(4) that found the display of the inflatable rat and the banners constituted an unfair labor practice would run headlong into the First Amendment precedent cited above and, at the very least, "require

[8] As the Board itself has recently observed, the Board "has no expertise in matters of constitutional interpretation and is entitled to no judicial deference when interpreting Supreme Court precedent on such matters." *Bethany College*, 369 NLRB No. 98, sl. op. at 5 (2020).

deciding serious constitutional issues." Moreover, given the careful parsing and expansive protection the Board has given employer statements (under the General Counsel's formulation, also "commercial" speech) under Section 8(c), see *CPL (Linwood) LLC,* 367 NLRB No. 14, at 3-4 (2018), the Board would be correctly criticized for rank hypocrisy should it be any less particular in its consideration of union speech.

Under these circumstances, the answer to the Notice's Question No. 4 is resounding: the finding of a violation by the Board on these facts under any standard would violate Local 150's First Amendment rights. That tender sensibilities may take offense at the display of an outsize inflatable reproach to their conduct does not warrant the Board's endorsement of an intrusion on fundamental constitutional protections.

CONCLUSION

On the record here, the General Counsel has failed to provide the Board with any basis to reexamine the doctrine enunciated in *Eliason & Knuth* and *Brandon Regional Medical Center*, and any reexamination leading to finding an unfair labor practice on these facts would trench on clear First Amendment rights. The Board should decline the invitation to revisit that precedent and affirm the Administrative Law Judge's decision.

Dated: December 28, 2020

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CERTIFICATE OF SERVICE

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